Supreme Court of the United States

No.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

INDEX

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	4
Statement of the Case	4
Reasons for Granting the Writ	20
Conclusion	25
Appendix	1a
Opinion of the Court of Appeals	1a
Judgment and Order of the Court of Appeals	7a
Judgment and Order of the Court of Appeals Denying the Petition for Rehearing	8a
Statutes and Rules of Criminal Procedure	10a
The Court's Instruction on the Indictment	13a

List Of Authorities Cited.

Edgerton v. United States, CA 9, 143 F. 2d 697	23
Ex Parte Bain, 121 U.S. 1, 30 L. Ed. 849, 7 S. Ct. 781	3
Finn v. United States, 256 F. 2d 304	22
Greathouse v. United States, CCA 4, 170 F. 2d 512	7
Herzog v. United States, CCA 9, 235 F. 2d 666	23
Hotch v. United States, 208 F. 2d 244	22
In re: Count Tolouse Lautrec, 102 Fed. 878 (CCA 7-1900)	7

PAGE

LaFever v. United States, 279 F. 2d 833 3

Lott v. United States, CA 5, 218 F. 2d 675 23

Marteney v. United States, CCA 10, 216 F. 2d 760 ....6, 22

Martyn v. United States, CCA 8, 176 F. 2d 609 7

Morris v. United States, 156 F. 2d 525 23

Quick Service Box Co., Inc. v. St. Paul Mercury Indemnity Company, CA 7, 95 F. 2d 15 7

Security National Bank of Durand v. Fidelity and Casualty Company of New York, 246 F. 2d 852 7

Smith v. United States, 230 F. 2d 935 23

Stirone v. United States, 4 L. Ed. 2d 252 3

United States v. Bailey, CA 7, 277 F. 2d 560 .....3, 22

United States v. Brown, CCA 2, 246 F. 2d 541 7

United States v. Calhoun, 257 F. 2d 673 22

United States v. Gallagher, 94 F. Supp. 640 7

United States v. Gordon, CA 3, 242 F. 2d 122 23

United States v. Levy, CA 3, 153 F. 2d 995 23

United States v. Manuszak, CCA 3, 234 F. 2d 421..... 22

United States v. Nelson, CA 7, 273 F. 2d 459.....7, 21

United States v. Sheridan, 329 U.S. 379, 381 footnote 4, 91 L. Ed. 359, 364 7

United States v. Vasen, CA 7, 222 F. 2d 3 23

United States v. Wiley, CA 7, 267 F. 2d 453, 268 F. 2d 500, 184 F. Supp. 679 .....4, 24

United States v. Wood, 58 F. Supp. 541, 452 7

Williams v. New York, 337 U.S. 241 (footnote pps. 250-251). 24, 25

Williams v. United States, 131 F. 2d 21 23

Wright v. United States, CCA 9, 172 F. 2d 310 7

PAGE

List Of Statutes And Rules Cited.

Section 2314, Title 18, U.S. Code 2, 4, 5, 6, 8, 20
Section 1254 (1), Title 28, U.S. Code 2
Rule 12 (b) (2), Federal Rules of Criminal Procedure 3, 4, 6, 21
Rule 30, Federal Rules of Criminal Procedure 4, 23
Rule 32 (c), Federal Rules of Criminal Procedure 4, 24
Rule 35, Federal Rules of Criminal Procedure 4
Rule 52 (b), Federal Rules of Criminal Procedure 4, 23

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

LEONARD GARFINKEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Leonard Garfinkel, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on November 30, 1960. The petition for a rehearing was denied on February 7, 1961.

JUDGMENT AND OPINION OF COURT BELOW.

The Judgment of the District Court for the Northern District of Illinois, Eastern Division, was entered on February 19, 1960, sentencing the defendant to imprisonment for a period of two years. It is not reported, but appears at pages 96-97 of the Appendix certified to this Court by the Clerk of the Court of Appeals.

The opinion of the Court of Appeals for the Seventh Circuit affirming said judgment was filed November 30, 1960. It appears in the Appendix hereto and in the certified copy of the Record. Rehearing was denied on February 7, 1961, and the order appears in the Appendix.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S. Code 1254(1).

QUESTIONS PRESENTED.

1. Does an indictment for violation of Title 18 § 2314 (and for a conspiracy so to do) which shows on its face that the defendant, in depositing certain money orders in his own bank, signed his own true name and address, and signed his own proper corporate name and title charge a criminal offense under the laws of the United States?

2. Is the Seventh Circuit right in holding that securities so endorsed are "falsely made, forged, or counterfeited" within the meaning of the Statute, or are the Second, Fourth, Eighth, Ninth and Tenth Circuits right in holding exactly to the contrary?

3. Is Title 18 § 2314 United Code a forgery or a perjury statute?

4. If Title 18 § 2314 is a forgery statute, as held in all but the Seventh Circuit, can a conviction stand where the proof shows the defendant signed his own name, gave his correct address and made no attempt to conceal his true identity?

5. Where the defendant before, during, and after trial has attacked the indictment as being insufficient to charge a Federal offense, is his motion renewing that attack under

Rule 12 (b)(2) of the Federal Rules of Criminal Procedure a "Collateral Attack" as held by the Court of Appeals,

6. Is the rule of law applied in *United States* v. *Bailey*, 277 Fed. 2d 560 (CA 7) permitting the sufficiency of the indictment to be attacked at any time on jurisdictional grounds, the correct rule, or is the contrary rule set forth in *LaFever* v. *United States*, (CA 7) 279 Fed. 2d 838, the proper rule where the defendant has not pleaded guilty, but has stood trial and at all stages attacked the indictment?

7. Where the court in explaining the charges in the indictment to the jury omits entirely the charge that the defendant was alleged to have done the acts in question *"knowing the same to have been falsely made, forged and counterfeited"*, can a conviction be permitted to stand?

8. Where this essential element of *scienter* is entirely omitted, is this not plain error cognizable under Rule 52 (b) of the Federal Rules of Criminal Procedure even though the defendant's former counsel failed to object to the instruction?

9. Does such fundamental omission not constitute a broadening of the indictment as held in *Stirone* v. *United States*, 4 L. Ed. 2d 252, and *Ex Parte Bain*, 121 U.S. 1, 30 L. Ed. 849, 7 S. Ct. 781.

10. Is it harmless error to omit to tell the jury that the Government has charged and must prove that the defendant knew the securities were forged, altered or counterfeited?

11. Is it not reversible error for a trial court about to sentence upon a jury verdict of guilty, to refuse to permit or deny the required presentence investigation by the probation service, and to use in its place the investigative

report of the Federal Bureau of Investigation without granting the defendant any opportunity to know its contents or rebut the same?

12. Does not the trial court's exercise of his self imposed rule of not considering probation where a defendant stands trial (as disclosed in the *Wiley* cases (*United States* v. *Wiley*, 267 Fed. 2d 453 and 278 Fed. 2d 500)) as his practice of considering in camera and without disclosure the FBI investigative reports, call for an exercise of this court's jurisdiction over the administration of Federal Criminal Procedure?

STATUTES AND RULES INVOLVED.

The pertinent provisions of the Criminal Code involved, and of the Federal Rules of Criminal Procedure are as follows:

Title 18 § 2314 United States Code.
Rule 32(c) Federal Rules of Criminal Procedure.
Rule 35 Federal Rules of Criminal Procedure.
Rule 12(b)(2) Federal Rules of Criminal Procedure.
Rule 30 Federal Rules of Criminal Procedure.
Rule 52(b) Federal Rules of Criminal Procedure.

These provisions appear in the Appendix hereto.

STATEMENT OF THE CASE.

Petitioner was convicted by a jury upon all counts of an indictment. Counts 1 through 9 charged him with violations of Title 18 § 2314 United States Code, in that he (together with others) did with unlawful and fraudulent intent transport and cause to be transported in interstate commerce certain "falsely made, forged and counterfeited securities (money orders)" "knowing the same to be

falsely made, forged and counterfeited." Inserted in each count was the money order in question containing the true name, address and signature, as well as his true corporate name and address.

The tenth count charged the defendant with conspiring to commit the offenses charged in the first nine counts.

Petitioner was sentenced to imprisonment for two years.

Prior to trial the petitioner filed a brief in support of his position that the indictment was insufficient to state a Federal Criminal offense. His motion in this regard was renewed during the trial and denied.

Since Notice of Appeal filed by petitioner's former counsel was untimely, his appeal was dismissed. However he filed in apt time two motions. The first was a motion for vacation of judgment and sentence and for correction thereof under Rules 35 and 12(b)(2) of Federal Rules of Criminal procedure, or in the alternative for arrest of judgment. The second was a motion to correct and vacate sentence under Rule 35 of Federal Rules of Criminal procedure. Both motions, after hearing, were denied.

The errors relied on relate:

1. To the failure of the indictment to state a Federal criminal offense since it was admitted that the defendant signed his true name to the securities.

2. To the failure of the Court to hold that title 18 § 2314 is a forgery and not a perjury statute.

3. To the failure of the Court to direct a verdict for the defendant where the Government induced no proof that the defendant knew the securities were forged, altered, or counterfeited.

4. To the "plain error" of the Trial Court in defining the charges of the indictment without telling the jury that it was charged that the defendant knew the securities were "forged, altered, or counterfeited."

5. To the holding of the Court of Appeals that a challenge to the sufficiency of an indictment under Rule 12(b)(2) constituted a "collateral attack on the indictment."

6. To the holding of the Court of Appeals that the sufficiency of an indictment cannot be challenged under Rule 12(b) even though the defendant has at all stages raised that question and has stood trial rather than plead guilty.

7. To the holding of the Court of Appeals that it was proper for the Trial Court to disregard the probation statute and consult instead, in camera, an FBI investigative report before sentence.

STATEMENT OF FACTS IN CONNECTION WITH PETITIONER'S CONTENTION THAT THE INDICTMENT DOES NOT STATE A FEDERAL CRIMINAL OFFENSE.

Five Courts of Appeal (the Second, Fourth, Eighth, Ninth and Tenth Circuits) have held that Title 18 §2314 is a forgery and not a perjury statute. They have held that to constitute a crime within the purview of this section it must appear that the defendant signed some name other than his own, and represented himself to be another person, real or fictitious, before a crime could be made out under this section.

See:

Marteney v. *United States*, 216 F. 2d 760, CCA 10;

Martyn v. *United States*, 176 F. 2d 609, CCA 8;
Wright v. *United States*, 172 F. 2d 310, CCA 9;
Greathouse v. *United States*, 170 F. 2d 512, CCA 4;
United States v. *Brown*, 246 F. 2d 541, CCA 2;
United States v. *Wood*. 58 F. Supp. 451, at 452;
United States v. *Flores*, 66 F. Supp. 880 (Virgin Islands);
United States v. *Gallagher*, 94 F. Supp. 640.

See also:

Footnote 4 to *United States* v. *Sheridan*, 329 U.S. 379, 381, 91 L. Ed. 364, 364.

The Court of Appeals for the Seventh Circuit has held otherwise. See:

United States v. *Nelson*, 273 Fed 2d 459 (CA 7);
Quick Service Box Co. Inc. v. *St. Paul Mercury Indemnity Co.*, 95 Fed 2d 15 (CA 7);
Security National Bank of Durand v. *F. & C. of N.Y.*, 246 Fed 2d 852;
In Re: Count DeToulouse Lautrec, 102 Fed 878 (CA 7—1900).

In fact, the Seventh Circuit in *Security National Bank of Durand* v. *Fidelity and Casualty Co.*, 246 Fed 2d 586 (CA 7) has admitted that it represents a minority view saying, "We must admit, however, that Quick apparently represents a minority view." This court has never directly been presented with the problem. The nearest approach and the only meager expression on the subject is contained in a footnote to *United States* v. *Sheridan*, 329 U. S. 379, where at p. 581 this court said, "Count 3, however, involves a check signed by the respondent in his own name as maker," and the Government, appar-

ently of the view that such a check is not "altered" or counterfeited, states, *"It is not clear that such a check is falsely made or forged within the general law."*

Since more and more prosecutions relating to money orders are being processed it is imperative that this court determine the critical issue here—namely—if it appears from the face of the indictment that the defendant has signed his own true name, has given his true address, has signed his proper corporate name and address, and where there is no attempt whatsoever to conceal his true identity, does the indictment state an offense under Title 18, §2314?

STATEMENT OF FACTS PRODUCED AT THE TRIAL IN CHIEF.

The salient facts produced at the trial are as follows: It was stipulated that one Norine McCarron, if called, would state that on June 25, 1958, she was night manager of the G. R. Branch of the Western Union Telegraph Co., St. Louis. That on that night she was held up and two books of American Express Company money orders taken, and that the money order set forth in Count 1 of the indictment was taken at that time and that when so taken the only mark it bore was "G. R. St. Louis, Mo."

It was further stipulated that if James Foster were called he would state that he was the manager of Glickman's Drug Store in Cleveland and that in April of 1958 this store was burglarized, and among the things taken was a Monroe Machine Mark II; that the stamp figures "I. E. Glickman's—5247 C. L." appearing on the money orders in Counts 2 through 9 were affixed with said machine.

It was further stipulated that if Bernard Ginsberg were called he would testify he was the owner of the

Peoples Drug Store in Cleveland, and that on March 15, 1958, his store was burglarized and that some 300 American Express Company money orders were taken; that the money orders set forth in Counts 2 through 9 were among those taken in said burglary. At the time they were taken they were blank as to sender, payee, amount and sub-agent.

It will be noted that there was no stipulation that the defendant had any knowledge of these matters.

Elijah Kennedy, the Government's first witness, owned a bar and tavern on 58th Street in Chicago, known as the Partners 204 Club. He was the same Elijah Kennedy charged jointly with the defendant in the case at bar. The defendant however was tried separately. He had known Garfinkel from business transactions, having borrowed money from him. On September 3, 1958, about one o'clock in the afternoon he had a telephone conversation with Garfinkel at which time he told the defendant that some people had some checks and they wanted to get rid of them. He asked Garfinkel if he thought he could handle them. The defendant told him he could at a price and Kennedy then told him he would send these people down to him. Garfinkel told Kennedy not to send them, but to bring them himself, so Kennedy then drove to 64th and Kimbark (in Chiago) where he picked up Eugene McIntosh (also a co-defendant). Kennedy and McIntosh then drove to 100 N. LaSalle Street where Kennedy left McIntosh in the car while he went to Garfinkel's office. When Kennedy picked up McIntosh he gave him "those checks" (money orders).

He identified Government's Exhibits 1 through 22 (the money orders in question) and said that they looked like the same money orders. They represented $1100 worth

of checks. At the time he first saw them he noticed they were of $50 value. He didn't notice whether the notation "Glickman's—5247 C.L." was on the money order since he did not examine it that close. Kennedy went to Garfinkel's office and had a conversation with Garfinkel out of the presence of others. He gave Garfinkel all the money orders, and Garfinkel then went across the street to the bank and left Kennedy in his office. Garfinkel came back and told Kennedy "he would go $450 on them." Kennedy said he would have to consult McIntosh. He did so and then came back and talked to Garfinkel. Garfinkel agreed on the money and said he would go to the bank and cash the things at the bank. Kennedy went to the bank with Garfinkel. Garfinkel asked Kennedy to sign the checks to which he would not agree. So Garfinkel signed them in Kennedy's presence and Garfinkel put his own name on them. Garfinkel and Kennedy then went back to the second floor of the bank and Kennedy was told to wait by the elevator. He was rejoined by Garfinkel, who told him that one of the checks was no good and he couldn't cash it because it had a stamp on it. Kennedy and Garfinkel then went back to the office and Garfinkel wanted some kind of a record for giving out $1100 and "made something on a piece of paper about a loan." Garfinkel told him to sign any name and he signed "John Robinson" and Garfinkel then gave him $450, and Kennedy left.

Garfinkel asked Kennedy to sign a check to him made out for the loan. The witness declined to identify the loan folder shown to him. He identified a Government's exhibit (a check that Garfinkel made out and had him sign). He stated that it was his signature, but the name "John Robinson" appeared. After he had signed the check Garfinkel kept it, kept $50, and made it out for $1050. He (Garfinkel) kept $50 of the check that he did not cash.

Kennedy tried to get $100 out of Garfinkel, but Garfinkel told him "get it from them." Kennedy tried to get Garfinkel to "knock something off of his bill," but Garfinkel declined to do that. When Garfinkel gave Kennedy the $450 none of the money was used to pay off Kennedy's bill. (He owed Garfinkel $1200 at that time.) Kennedy stated that he gave the balance of the money to McIntosh.

On cross-examination he stated he was a defendant in the case; that he did not know what plea had been entered for him; that he had talked to the Assistant United States' attorneys; that he was not promised anything in return for his testimony; and that he was telling the truth; that on September 3, 1958, Kennedy made a call at Garfinkel's office; that he owed Garfinkel about $1200 at that time; that from time to time additional loans were taken out and that he was making payments on them; that he brought up "22 checks (money orders) to Garfinkel of a value of $50 a piece; that these checks were complete *with the exception that they didn't have the writing on there "Lenmark Associates, Inc., L. Garfinkel, 9358, 100 North LaSalle Street, Chicago, Illinois."* The only thing Kennedy saw Garfinkel write was his name. The checks were not blank as they had the $50 "in there". He stated that McIntosh, from whom he had got the money orders, did not say they were stolen, but Garfinkel knew they were stolen. He stated:

Q. Did you ever tell Mr. Garfinkel they were stolen?
A. Well, yes he knew they were stolen.
Q. Did you tell him they were stolen?
A. Yes, I told him.
Q. Well, you knew they were stolen?
A. I told you I knew that wasn't right, you know."

The witness stated that the person waiting outside was not named Robinson; that he (Kennedy) wrote John Robinson on the check although that wasn't his name. He stated that Garfinkel kept the check himself and that the check was for $1050. He denied that Garfinkel told him he was making a charge of $50 as a service charge. He stated that Garfinkel deposited the money orders given him by Kennedy. He stated that he had borrowed money to pay Garfinkel the balance of the loan which had been made to him. He stated that he (Kennedy) got $100 from McIntosh but Garfinkel didn't give him anything.

James B. Hyland, a special agent for the American Express Company, charged with the duty of investigating robberies for the American Express Company stated that Government's Exhibits 1 and 2 bore the stamp "Paid, Mexico, New York, September 9, 1958"; that Mexico is an abbreviation of an American Express Company and that it is incorporated in the paid stamp and goes to the paid files in New York; that the stamp is placed on it in New York.

On October 10, 1958, the witness interviewed Garfinkel at 100 North LaSalle Street. He showed Garfinkel 21 money orders (Government's Exhibits 2 through 22) and asked Garfinkel how they came into his possession. The defendant told him he had gotten them as a collateral on a loan of $1100; that there was one more money order that was involved that he (Hyland) did not know about at the time. Garfinkel showed him his loan card containing the name "Robins" on it and there was $1100 on it or something like that. Garfinkel stated he could not give him any information about the man who had made the loan except to describe him as a colored man about 40 years old, 5'8" in height. Garfinkel stated he did not

recall ever having seen the man before, but that he did a lot of business in the colored section and very likely someone had recommended this man to come to his office for a loan. Garfinkel told Hyland that the money orders had gone through his (Garfinkel's) account at the American National Bank. Hyland requested reimbursement of $1050 from Garfinkel and Garfinkel wrote him out a check for that amount. About this time Hyland had informed Garfinkel that the money orders in question were stolen money orders. Garfinkel told Hyland that when he went to cash them he took them over to the bank and asked the Assistant Cashier, or an official of the bank, and asked if they were good and the banker said as far as he knew they were all right. Garfinkel took Hyland to his bank where they talked to a gentleman at the bank to whom Garfinkel believed he had spoken. Hyland left the exhibits (2 through 22) with Garfinkel when he received the check from him.

On cross examination he stated that until Garfinkel informed him he did not know there were 22 money orders involved. He further testified that a person in whose possession one of these money orders came, issued by the American Express Company, was at liberty to put in any name, as the person to whom it is payable, and any other name as a sender, and that such person does not necessarily have to put his own name in there. That in some instances the amount is in blank and in some instances the amount is written in the hand of the sender or stamped in others.

The witness described on redirect examination the difference between the machine type and hand-written type of money orders.

He further stated that Garfinkel told him that he filled in the face of the money orders.

On re-cross examination the witness stated that defendant's Exhibit 2 was different in form from Exhibit 1, which was a handwritten type of money order.

George Stephan was a special agent of the FBI. On October 17, 1958, he interviewed the defendant at his office, 100 North LaSalle Street, together with Agent Sapp. He informed the defendant that he was inquiring about 22 fraudulent American Express money orders cashed on September 3, 1958, and told the defendant that they were stolen in a burglary in Cleveland, and asked Garfinkel from whom they had been obtained. At first Garfinkel stated they were obtained from a negro male and he was not sure whether the man's name was Robins or Robinson. He was shown a loan file and was given the 22 American Express money orders by Garfinkel. He identified Exhibits 2 through 22 as the money orders in question. Garfinkel asked to talk with an associate named Kass, who was a lawyer, and after a private conference Garfinkel stated he would like to change his story and stated that Elijah Kennedy had been a long customer of his since 1957 and owed him approximately $2400; that on September 2, 1958, he was advised by Kennedy that an individual by the name of Robins or Robinson owed Kennedy money and that Kennedy stated that should he obtain some money from Robins or Robinson he would in turn repay Garfinkel what he owed him. A day or two later Kennedy returned with 22 American Express money orders which he requested Garfinkel to pay. The aggregate sum of them was $1100. The defendant stated he took these money orders to his bank, the American National, and upon arriving at the bank he went to two officers, one Stromberg, and another, McLaughlin, and inquired as to whether or not the money orders were good, and that the individual at the bank told him that so long as he filled in the faces they were

valid instruments. Garfinkel told Stephan that he was under the impression that the money orders came from an individual named Robins or Robinson, and that he cashed these money orders for Kennedy, filling in the complete faces of the money orders (Government's Exhibits 1 through 22). Garfinkel stated he charged Kennedy a service fee for cashing the money orders. Garfinkel stated that it was his practice to make a loan folder (Government's Exhibit 23) so that his accountant could account for the moneys in the loan company; that *he gave Stephan (the* FBI Agent) the check for $1050 which had been returned from his bank. Garfinkel told Stephan that this was the check he gave to Elijah Kennedy for the $1100 worth of money orders and that Kennedy had taken this check out of his office and that he assumed that Kennedy was to give this check to Robins or Robinson, and that they came back to Garfinkel at that time and places the second endorsement on the checks so it could be cashed; that they went personally to the American National Bank and cashed it. Garfinkel stated that the reason he had not told him about Kennedy in the first place was that he was afraid that it would hurt his chance of obtaining the money that Kennedy owed him.

On cross examination he stated that as a result of the information given Stephan by Garfinkel Kennedy was apprehended and later taken into custody.

It was stipulated that the bank's records show that on the day in question (September 3, 1958) the defendant's deposit slip stamped by the bank showed 22 at $50; that this was within the column P.O. money orders, checks on banks in other cities; that the total $1100 was credited to the account of Lenmark Associates, Inc., 100 North LaSalle Street.

This constituted the Government's case.

The defendant made his motion for a verdict of acquittal, and after argument thereon, the defendant called five character witnesses who attested to the good reputation of the defendant.

In addition, one Paul Stromberg, Assistant Cashier of the American National Bank and Trust Company, who knew Garfinkel for about four years and knew of the business conducted by Garfinkel's corporation (Lenmark Acceptance Corporation), testified he had an account in his bank, and in the past had called upon him for advice on banking matters. On or about September 3, 1958 he had a conversation with Garfinkel. the subject matter of which was that he (Garfinkel) had American Express money orders that were not completed and he (Garfinkel) asked the witness if he could deposit them in the bank. He identified the type of money orders, concerning which this discussion took place. He had informed Garfinkel that if a money order had not yet been completed it could be negotiated if he filled in the payee's name and deposited it to his (Garfinkel's) account. He did not recall whether he was shown any of the money orders by Garfinkel. He, as a banker, had no way of telling whether the money orders were good, only whether they were negotiable.

On cross-examination he said he assumed that the account referred to would be Garfinkel's corporate account.

The defendant, after giving his personal history and stating that he was married and had three daughters, stated that he had never been convicted of a criminal offense, nor charged therewith. He testified that Kennedy had first been introduced to him by Kennedy's attorneys and that Kennedy subsequently became a bor-

rower from his corporation, "Lenmark Associates Inc." From time to time he made a number of loans to Kennedy. On or about September 3, 1958 Kennedy came to his office. He had previously called him. At that time Kennedy was in arrears with the company. Kennedy came to Garfinkel to negotiate 22 American Express money orders and stated to him that a friend of his (Kennedy's) was from out of town and that he had come to Chicago, and that he owed Kennedy a considerable sum of money; that since he was in Chicago he had agreed to pay Kennedy, but that he (Kennedy) would have difficulty in negotiating the money orders at the places where he was known because he (Kennedy) owed other sums of money to those places. He stated that this Mr. Robinson (Kennedy's friend) was willing to pay him at this time the amount that he owed him, but that he would have difficulty in negotiating these money orders since he was from out of town and unknown. Kennedy stated that once he had received the money from Mr. Robinson, his friend, and after he had determined the exact amount he (Kennedy) would pay Garfinkel a substantial amount on the debt that he owed Garfinkel. Kennedy then showed Garfinkel 22 money orders. Garfinkel completed the face of the money orders following the words "Payable to" in which he inserted "Lenmark Associates, Inc." and the center, date and address. *The first time Garfinkel saw Government's Exhibits 2 through 22 the figure $50 was inserted on them by a machine and they bore the stamp "Glickman" with the number following it...* On one money order (Government's Exhibit 1) the amount was not filled in, so Garfinkel testified that he inserted the words "Fifty Dollars" in his own hand. Garfinkel stated that he made it clear to Kennedy that there would be a service charge of $50.00 to negotiate the money orders and this was agreed to. Garfinkel then went across the

street to his bank to find out about the money orders and Kennedy insisted on coming along. They went to the American National Bank right across the street where he maintained the account of Lenmark & Associates. He spoke to a Mr. Stromberg, an officer of the bank, and told him that he was not familiar with money orders from Express companies; said that he was negotiating these and asked if they were good and further asked what he should do with them. Stromberg looked them over and told him they were all for $50. He informed Garfinkel that if he wished to deposit them merely to complete them and deposit them, which Garfinkel did, making out a deposit slip. He deposited 22 money orders, and entire number given him by Kennedy to the account of Lenmark Associates, Inc. (his corporation). After depositing the money orders Kennedy and Garfinkel went back to Garfinkel's office and he sat down and issued a check for the 22 money orders, less a $50 service charge. The defendant stated he started to make out the check payable to Mr. Kennedy, but Kennedy insisted that he would have to show his friend who was driving the car around the block, the check in the amount of $1050 and account to him for the deduction of $50. Garfinkel made out the check in the amount of $1050 to John Robinson and gave it to Kennedy who left the office to find his friend. He was gone approximately 15 minutes. Upon his return he stated that Robinson would be no better off with the check than he had with the money orders, since he could not cash the check at the various currency exchanges where he was known. Garfinkel asked Kennedy if he should make out a new check and take off three or four or five hundred dollars that he (Kennedy) had pledged would be applied on Kennedy's obligation to Garfinkel. Kennedy said, "No. Cash the check and let me show the money to Mr. Robinson who is driving

my car around the loop. Then I will come back to your office." Garfinkel then gave him the check and he and Garfinkel went to the American National Bank where they gave the check to the teller, who told Garfinkel to endorse the check on the back. Garfinkel did so and his signature appeared beneath that of "John Robinson." Garfinkel stated that the signature "John Robinson" was not placed on the check in his presence, but had been procured by Kennedy. The check was then cashed and the proceeds given to Kennedy. Garfinkel then returned to his office (expecting Kennedy to return with the money). Garfinkel waited at his office for half to three-quarters of an hour and then tried to contact Kennedy. He was unable to do so.

On September 15th Kennedy came to Garfinkel's office. Garfinkel stated he had not lived up to his agreement and Kennedy stated that he had decided that since his inventory was low in his liquor store, it would be more important for him to go out and buy liquor than to come up and pay his obligations.

Garfinkel stated that some time later a gentleman from the Railway Express Agency came to see him. This was Mr. Hyland. Hyland had in his possession 21 American Express Money orders and he told Garfinkel that they had been stolen and that since Garfinkel's endorsement appeared on them, his company would be grateful if he would issue a check in the amount of $1050. Garfinkel informed him that the amount should be $1100 and that there actually were 22 money orders involved. He showed Hyland his loan card which he had made out for his accountant, since there had been a $50 profit on the transaction (the deduction for his service charge). Garfinkel denied any conversation with this witness in which he discussed that the money orders were for collateral on a

loan. Garfinkel identified his check in the amount of $1100 made payable to the American Express Company which he had had certified at the request of Mr. Hyland in Hyland's presence.

Garfinkel further stated that on October 17, 1958, two FBI agents came to his office. He told them that the money orders had come from a colored fellow who was from out of town; that he did not make it a practice to negotiate money orders for people from out of town; that this was the first time; that Stephan (FBI Agent) asked for the money orders and Garfinkel gave it to them. He admitted that at first he did not tell them from whom he had received the money orders, but that he subsequently told them after conferring with Mr. Kass, his partner. He then told them that Kennedy had brought the money orders to him and gave them Kennedy's address.

On cross examination he stated that he had heard Kennedy testify that he had only given him $450.00, but that this was not true. He stated that Kennedy lied when he had testified that Garfinkel had told him that he had a fellow who had some money orders and that he had stated that he "could get rid of them at a price."

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals has so far sanctioned a departure from the procedure and standards appropriate for criminal trials in the Federal Courts as to call for an exercise of this Court's supervision.

1. There is a critical need for this Court's analysis and delineation of the elements necessary to a prosecution of the crime set forth in Title 18 §2314. To date five Courts of Appeal have applied the "true name" doctrine

to securities which have been signed by the defendant in his own name, where there has been no attempt to conceal the true identity of the defendant. On the other hand the Court of Appeals for the Seventh Circuit has held to the contrary in four occasions. This court has never had occasion to directly examine this question.

2. There is a critical need for this court's basic delineation of the meaning "falsely made, forged and counterfeited" as set forth in this statute. The Seventh Circuit in this case, as in the case of *United States* v. *Nelson*, 273 Fed. 2d 459, has held that even though the defendant signs his own name and does not attempt to conceal his identity, he is guilty of "falsely making, forging, or counterfeiting the security" if the document itself is false. This is directly contrary to the holding of the Courts of Appeal in the other five abovementioned Courts of Appeal. In fact, as heretofore stated, the Seventh Circuit has admitted its rulings on this point express "a minority view." Prosecutions for this crime are becoming commonplace in every Circuit in the country. Money orders issued in blank are sold at drug stores, banks, insurance companies, savings and loan associations and many other sources of distribution. There is an urgent necessity for a definitive interpretation of the elements of the section of the Statute involved.

3. Here the defendant challenged the indictment even before trial. He challenged it during trial and at its end. He moved under Rule 12(b)(2) of Federal Rules of Criminal Procedure to vacate and set aside the sentence as illegal, again contending that the indictment did not state a Federal crime. But the Court of Appeals branded his attack as being a "collateral attack," since his former counsel had been three days late in filing his

Notice of Appeal. Is a challenge to the indictment under this rule which states "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding" a collateral attack?

There are within the Seventh Circuit itself a number of conflicting decisions relating to this very subject. In *United States* v. *Bailey*, 277 Fed. 2d 560 and *United States* v. *Calhoun*, 257 Fed. 2d 673, the court has held that the sufficiency of the indictment to charge an offense may be raised on appeal even though the point was not raised at all in the trial court, whereas in *United States* v. *Hoyland*, 264 Fed. 2d 346 and *LaFever* v. *United States*, 289 Fed. 2d 833, the same court held that if the defendant pleads guilty he cannot later challenge the sufficiency of the indictment, having waived that right.

But here, evidencing its utter confusion on the subject, the Court of Appeals has applied the doctrine of the *Hoyland* and *LaFever* cases—even where the defendant did not plead guilty, but stood trial, and where at every step in the procedure, before, during and after trial, he contended that no criminal offense was stated in the indictment. Other Circuits, the Tenth, the Court of Appeals for the District of Columbia, the Third, and the Ninth have all adhered to the rule as set forth in the *Bailey* case. See: *Finn* v. *United States*, 256 Fed. 2d 304; *United States* v. *Manuszak*, 234 Fed. 2d 421; *Marteney* v. *United States*, 216 Fed. 2d 760; and *Hotch* v. *United States*, 208 Fed. 2d 244.

From our search it appears that this court has never interpreted this very important rule. There appears to be a real necessity for its interpretation.

4. In this case the trial court, in informing the jury of the charges contained in the indictment, omitted entirely to inform them that the defendant was charged with causing the transportation of the securities involved "*Knowing that the same were falsely made, forged and counterfeited.*" The court's charge in this regard is set forth in Appendix E of this petition. Thus the element of scienter was entirely removed as a basic element that the Government must prove. Petitioner's former counsel did not object to this portion of the charge, but present counsel did raise this issue on appeal. The petitioner contends that this error is of such a fundamental nature that it should be recognized under Rule 52(b) of the Federal Rules of Criminal Procedure as "plain error," despite the provisions of Rule 30 to the effect that objections to instructions are waived unless made before the jury returns.

There are numerous cases of many Courts of Appeal that so held:

Williams v. *United States*, 131 Fed. 2d 21;
Herzog v. *United States*, (CA 9) 235 Fed. 2d 666;
Edgerton v. *United States*, (CA 9) 143 Fed. 2d 697;
United States v. *Vasen*, 222 Fed. 2d 3 (CA 7);
United States v. *Levy*, 153 Fed. 2d 995 (CA 3);
United States v. *Gordon*, 242 Fed. 2d 122 (CA 3);
Morris v. *United States*, 156 Fed. 2d 525;
Smith v. *United States*, 230 Fed. 2d 935;
Lott v. *United States*, 218 Fed. 2d 675 (CA 5).

In addition this Court in *Ex Parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849, has held that the elimination of essential matter charged constitutes an amendment to

the indictment, erroneous *per se*. Cf. *Stirone* v. *United States*, 4 L. Ed. 2d 452.

5. In this case the Trial Court obviously applied his "self imposed" *rule of refusing to consider an application for probation if a man stands for trial.* This rule has met the condemnation of the Court of Appeals for the Seventh Circuit. See: *United States* v. *Wiley*, 267 Fed. 2d 453, 456 (CA 7); *United States* v. *Wiley*, 278 Fed. 2d 500 and the Trial Court's Apologia contained in *United States* v. *Wiley*, 184 F. Supp. 679.

When the jury had returned its verdict of guilty, counsel for the defendant moved the court to order a presentence investigation in accordance with applicable statutes. The court, ignoring this request, neither granted nor denied it, but set the matter for hearing on the defendant's motion for the following day, thus effectively precluding any such presentence investigation as required by Federal Criminal Rules 32(c)(1), and as suggested by this court, even in *Williams* v. *New York*, 337 U.S. 241 (footnote p. 250-251).

The day following sentence of two years was imposed —after the court had heard a somewhat hysterical utterance from the defendant protesting his innocence.

In the meanwhile, the court had instructed the prosecuting attorney to furnish to him the full investigative report of the FBI, which he wanted to consider "in camera."

In sentencing the defendant the court stated that he had considered this report overnight and had concluded that the sentence should be two years. Neither the defendant nor his counsel had any opportunity to see the report or rebut its contents. When, on appeal, the de-

fendant moved for its production, the court refused to order it produced, even for the benefit of the Court of Appeals.

The defendant contends that such secrecy is basically inimical to the proper and fair administration of Federal Criminal Jurisprudence; that the private consultation of FBI investigative reports is not a proper part of the sentencing procedure, "being presumptively prejudicial." Congress has set up a Probation Department to properly advise sentencing courts of the facts they should know before sentencing a defendant. This court has frequently held that the use of the Probation Department's reports should be encouraged and not ignored (*Williams* v. *New York*, 337 U. S. 241).

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD G. FINN and
MAURICE J. WALSH,
Attorneys for Petitioner

APPENDIX A.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1960—SEPTEMBER SESSION, 1960

No. 13011
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LEONARD GARFINKEL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 30, 1960.

Before DUFFY, KNOCH and CASTLE; *Circuit Judges.*

CASTLE, *Circuit Judge.* Defendant, Leonard Garfinkel, and Elijah Kennedy, and Eugene McIntosh were indicted in nine counts on charges of having, with unlawful and fraudulent intent, transported and caused to be transported in interstate commerce nine separate falsely made and forged American Express Company money orders, knowing the same to have been falsely made, forged and counterfeited, in violation of Title 18 U.S.C.A. §2314. The tenth count charges all three persons with unlawful conspiracy to commit the offenses described in violation of Title 18 U.S.C.A. §371. The defendant Garfinkel was tried separately by a jury. On February 18, 1960 he was found guilty as charged in the indictment.

This appeal is taken by Leonard Garfinkel and asserts error in the denial of two motions after verdict and sen-

tence. After sentence a notice of appeal from the judgment and sentence was filed by former counsel for Garfinkel but said notice of appeal was filed more than ten days after the imposition of sentence and was therefore subject to motion to dismiss. On motion of the United States it was dismissed by this Court on March 15, 1960.

Thereafter on March 16, 1960, less than thirty days after the entry of the judgment and sentence in this case, which occurred on February 19, 1960, the defendant by his present counsel filed two motions.

1. A motion for vacation of judgment and sentence and for correction thereof under Rules 35 and 12 (b) (2) of Federal Rules of Criminal Procedure, or in the alternative, for arrest of judgment in the above entitled cause.
2. Motion to correct and vacate sentence under Rule 35 of the Federal Rules of Criminal Procedure.

On March 17, 1960, the court denied each of these motions. This appeal followed.

The first motion which was for a vacation of judgment and sentence and for correction thereof and was brought under Rule 35 and 12 (b) (2) of Federal Rules of Criminal Procedure, and also asked in the alternative for arrest of judgment, was aimed at what the defendant conceives to be a fatal defect in the indictment.

The second motion also brought under Rule 35 of the Federal Rules of Criminal Procedure, presented the contention of the defendant Garfinkel that the District Judge in accordance with a long standing policy, where defendants exercised their rights to jury trial and were convicted, failed to accord to the defendant due process of law and deliberately voided and nullified a provision of the Federal Rules of Criminal Procedure, 32 (c) (1). Both of these motions were denied by the Court.

The contested issues are:

1. Did the indictment charge an offense under 18 U.S.C. Section 2314, and if it did, was it subject to collateral attack by motion after conviction and dismissal of appeal?

2. Is a presentence investigation mandatory and may a Judge determine sentence upon receipt of other information?

The sentence of two years imposed on the defendant is a general one, imposed on all counts of the indictment. Since the term of sentence is one well within any of counts 2 through 9, the maximum sentence being 10 years or $10,000, 18 U.S.C. 2314, our consideration will be limited to these counts. Affirmance on these counts will be sufficient to affirm without reference to the others. *United States* v. *Cephas,* 7 Cir., 263 F.2d 518, 519.

During the course of the trial it was stipulated by the defendant that the Government's exhibits 2 through 9 and the machine used to affix the signature of the subagent were stolen at Cleveland, Ohio.

At the time that the government's exhibits 2 through 9 were stolen they were blank as to sender, payee, amount and subagent. Defendant further stipulated that in April, 1958 a Monroe Machine Mark II was stolen from the Glickman Drug Store at Cleveland, Ohio, and that the stamp figues "I. E. Glickman—5247 C.L.", appearing on the money orders in Counts 2 through 9, were affixed thereon with the stolen machine.

Exhibits 2 through 9 were stolen. They were and became forged instruments when the mark "I. E. Glickman—5247 C.L." was impressed thereon by the stolen machine. The defendant did not deny this forgery in the lower court nor can he now deny it. He agreed that he would handle the money orders at a price. And the evidence establishes that he did help the others involved to get rid of the checks. In further substantiation of the invalidity of the instru-

ments and the forgery thereof is the fact that the defendant paid Kennedy, a co-defendant, $450 for $1100 in such money orders. On this state of the record the instant case becomes identical with the case of *United States* v. *Nelson*, 7 Cir., 273 F.2d 459.

Defendant raises for review once again before this Court the application of the "true name" doctrine to American Express money orders. In effect the defendant attempts to distinguish this case from this Court's but recent opinion in *United States* v. *Nelson*, 7 Cir., 273 F. 2d 459.

We think there is no distinguishable difference between the *Nelson* case and the instant appeal. The defendant stresses that he affixed his true name under his true signature and the true name of his corporation under which he operated his business and his true address. But the name of the authorized subagent of the American Express Company was forged on Government's exhibits 2 through 9.

We are further of the opinion that the motions filed by the defendant constitute collateral attack. The attack now is against the validity of the judgment and not against the validity of the sentence.

In *Cook* v. *United States*, 1 Cir., 171 F. 2d 567, 570, 571 it was pointed out:

> "A motion for correction of sentence under Rule 35 presupposes a valid conviction and affords a procedure for bringing an improper sentence into conformity with the law. The short time limit upon motions in arrest of judgment, as provided in Rule 34, cannot be circumvented by a motion at any time after conviction for vacation of judgment and sentence on the ground of defects in the indictment upon the theory that such a motion is merely a motion to 'correct an illegal sentence' under Rule 35. The object of such a motion would be not to 'correct' a sentence but to be relieved of it altogether."

This Court has refused to permit collateral attack on a judgment of conviction where the "true name" doctrine is involved. *U.S.* v. *Hoyland*, 7 Cir., 264 F.2d 346; *La Fever* v. *United States*, 279 F. 2d 833.

It is our opinion that following a conviction of guilty petitioner is in no position to raise what he calls a question of jurisdiction under Rule 35 on the grounds of defects in the indictment upon the theory that such a motion is merely a motion to correct an illegal sentence. Therefore we hold that the District Court was correct in denying the defendant's motion for vacation of judgment and sentence and for correction thereof under Rules 35 and 12 (b) (2) of the Federal Rules of Criminal Procedure, or in the alternative, for arrest of judgment.

The defendant's second motion complains of the fact that the District Court did not order a presentence investigation before imposing sentence.

The District Court did avail itself of information supplied to it by an F.B.I. report and neither defendant nor his counsel made an objection. Defendant complains of the fact that a presentence investigation might have disclosed his physical condition and that of his family. These fac were within his knowledge prior to the sentencing. He and his counsel both stood mute before the court and made no reference thereto:

> "The Court: I want to read that and you reply on your motion for probation on what you have just said with reference to the record already. Is there anything else that you want to submit?
>
> Mr. Gorman: No. I do not believe that there is anything further that I could submit."

Under the facts and circumstances of this case defendant's reliance upon *United States* v. *Wiley*, 7 Cir., 267 F. 2d 453 and *United States* v. *Wiley*, 7 Cir., 278 F. 2d 500 is misplaced. The defendant here was accorded a probation hearing.

We are of the opinion that under these circumstances the motion to correct and vacate the sentence under Rule 35 of the Probate Rules of Criminal Procedure was properly denied by the District Court.

We have considered all of the arguments advanced by defendant in support of its contentions but find them without merit.

JUDGMENT AFFIRMED.

AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Wednesday, November 30, 1960

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

United States of America, Plaintiff-Appellee, No. 13011 vs. Leonard Garfinkel, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Tuesday, February 7, 1961

Before

Hon. F. Ryan Duffy, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Latham Castle, Circuit Judge

United States of America, Plaintiff-Appellee, No. 13011 vs. Leonard Garfinkel, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages contain a true copy of the Appellant's Appendix, filed September 1, 1960; the Opinion filed November 30, 1960; the judgment entered November 30, 1960; the Order Denying Petition for Rehearing, entered February 7, 1961 in

Cause No. 13011

United States of America,

vs.

Leonard Garfinkel,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this ninth day of February A.D. 1961.

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals
for the Seventh Circuit.

(Seal)

APPENDIX D.

STATUTES AND RULES OF CRIMINAL PROCEDURE.

SECTION 2314, TITLE 18, U. S. CODE

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

FEDERAL RULES OF CRIMINAL PROCEDURE
TITLE 18 U.S. CODE

Rule 32(c)—Presentence Investigation

The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

Rule 35—Correction or Reduction of Sentence

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 12(b)(2)—Pleadings and Motions Before Trial; Defenses and Objections Which Must Be Raised.

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the

court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

RULE 30—INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52(b)—HARMLESS ERROR AND PLAIN ERROR

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX E.

THE COURT'S INSTRUCTION ON INDICTMENT.
(Tr. 298-301)

Ladies and Gentlemen of the jury, this is the case that has been instituted in this Court by the return of an indictment No. 59 CR 45, by the Grand Jury of this District on January 22, 1959, which indictment contains ten counts and charges Elijah Kennedy, Eugene McIntosh, and Leonard Garfinkel in the first count on or about September 3, 1958, with unlawful and fraudulent intent to transport and cause to be transported in interstate commerce, from Chicago to New York City, a certain falsely-made, forged and counterfeited security, which security, had on the face and back thereof the following description and attached thereto is a photostatic copy of one of the money orders in this case.

Count II is exactly the same charge and with reference to another money order. Count I is Serial WU-24,097,719. And Count II is Serial No. CL-300,528,793, and it charges the same people with the same offense with reference to that money order.

Each of them is in the amount of $50.00.

Count III charges the same offense on the same date, with reference to a money order numbered 300,528,795, also for $50.

Count IV charges the same three people with the same offense on September 3, 1958, with reference to money order CL-300,528,797, also for $50.

Count V charges the same defendants with the same offense, on the same date, with reference to money order CL-300,528,798, also for $50.

Count VI charges the same three defendants on the same date with the same offense with reference to money order CL-300,508,061.

And Count VII charges the same three defendants on the same date with the same offense, with reference to money order CL-300,528,662, also in the amount of $50.

Count VIII charges the same three defendants with the same offense, on the same date with reference to money order CL-300,528,663, also in the amount of $50.

Count IX charges the same defendants, three of them on the same date with the same offense, with reference to money order CL-300,528,664, also in the amount of $50.

All nine of these money orders being of the American Express Company.

Count X charges that on or about September 3, 1958, the same three defendants, Elijah Kennedy, Eugene McIntosh and Leonard Garfinkel, did unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree with each other to commit offenses against the United States of America, that is to say, to commit the offenses described in the preceding nine counts with reference to those nine money orders and that in pursuance of that conspiracy that they committed two overt acts; first, that they did the things they are accused of in the nine preceding counts; namely, transport or caused to be transported in interstate commerce these money orders knowing the same to be fraudulent.

And (b) that the defendant, Leonard Garfinkel, on September 3rd, 1958, at Chicago, Illinois, presented the Express Company money orders described in Counts I through IX of the indictment to the American National Bank and Trust Company in violation of Title 18, Section 371 of the United States Code. The preceding nine counts charged a violation of Section 2314 of Title 18 of the United States Code.

FILE COPY

JAMES R. BROWNING

No. 784

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEONARD GARFINKEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and Rule involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Banks v. *United States*, 239 F. 2d 409, certiorari denied, 353 U.S. 960	7
Goto v. *Lane*, 265 U.S. 393	7
Marteney v. *United States*, 216 F. 2d 760	8
Martyn v. *United States*, 176 F. 2d 609	7
McGann v. *United States*, 249 F. 2d 431, certiorari denied, 356 U.S. 923	7
Sunal v. *Large*, 332 U.S. 174	9
Tarkington v. *United States*, 194 F. 2d 63	9
United States v. *Brown*, 246 F. 2d 541	8
United States v. *Greathouse*, 170 F. 2d 512	7
United States v. *Karavias*, 170 F. 2d 968	9
United States v. *Schwenke*, 221 F. 2d 356	9
United States v. *Visconti*, 261 F. 2d 215, certiorari denied, 359 U.S. 954	9
United States v. *Wiley*, 267 F. 2d 453	9
United States v. *Williams*, 254 F. 2d 253	9
Wright v. *United States*, 172 F. 2d 310	7

Statutes and Rules:

	Page
18 U.S.C. 2314	2, 3, 7
28 U.S.C. 2255	8
Rule 30, F.R. Crim. P	8
Rule 32, F.R. Crim. P	2
Rule 32(c)(1), F.R. Crim. P	2, 4, 9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 284 F. 2d 548.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1960 (Pet. App. 7a). A petition for rehearing was denied on February 7, 1961 (Pet. App. 8a–9a). The petition for a writ of certiorari was filed on March 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether money orders, imprinted with a stamp stolen from the purported issuer, were "falsely made" and "forged" within the meaning of 18 U.S.C. 2314, even though petitioner had signed them as sender with his true name.

2. Whether petitioner, who failed to take a timely appeal, may attack the court's charge.

3. Whether the court after denying a motion for probation could properly impose sentence without ordering a presentence investigation report.

STATUTE AND RULE INVOLVED

18 U.S.C. 2314 provides in pertinent part as follows:

* * * * *

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

Rule 32 of the Federal Rules of Criminal Procedure provides:

* * * * *

> (c) *Presentence Investigation.*
>
> (1) *When made.*—The probation service of the court shall make a presentence investigation and report to the court before the imposi-

tion of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.*—The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

* * * * *

STATEMENT

Petitioner and two others were charged in an indictment returned in the United State District Court for the Northern District of Illinois in nine counts with unlawfully transporting and causing to be transported in interstate commerce nine separate falsely made and forged American Express Company money orders of $50 each, knowing the same to have been falsely made, forged, and counterfeited, in violation of 18 U.S.C. 2314 (R. 2–20). The tenth count charged a conspiracy to commit the foregoing offenses (R. 20). Petitioner was tried alone (R. 31), and the jury found him guilty as charged (R. 96). He was sentenced to imprisonment for a period of two years (R. 96–97). A notice of appeal from the conviction was filed later than the 10-day period for an appeal, after which the appeal was dismissed on motion of the government (R. 98–99, 113–114).

Petitioner then filed (1) a motion for vacation of judgment and sentence and for correction thereof under Rules 35 and 12(b)(2), F.R. Crim. P., alleging primarily that the indictment on its face failed to charge a criminal offense; and (2) a motion to correct and vacate sentence under Rule 35, alleging that the court failed to use the presentence investigation procedure of Rule 32(c)(1) (R. 102–113). These two motions were overruled on March 17, 1960 (R. 115–116), and petitioner appealed from this judgment (R. 116–117). The court of appeals affirmed the judgment (Pet. App. 7a).

Pertinent evidence adduced at the trial may be summarized as follows:

1. On each of the nine American Express $50 money orders involved in the indictment, the petitioner signed his name as sender and wrote in the name Lenmark Associates, Inc. (petitioner's corporation) as the payee. He then deposited the money orders to the credit of the corporation in a Chicago bank, and the bank forwarded the money orders to New York for payment by the American Express (R. 3, 5, 7, 9, 11, 13, 15, 17, 19). The money orders in counts 2 through 9 bore stamped impressions reading "Glickman—5247 CL," which stamp identified Glickman's Drug Store in Cleveland, Ohio, a subagent of the American Express Company, as the purported issuer of the money orders (see, *e.g.*, R. 11). There was no dispute that the money order blanks had been stolen and that the Glickman stamp had been affixed with a machine stolen in a burglary of the drug store (R. 31–32).

The principal prosecution witness was co-defendant

Kennedy, who later pleaded guilty (R. 122–123). Kennedy testified that on September 3, 1958, he telephoned the petitioner, from whom he had borrowed money in previous transactions, saying that some people had checks they wanted to "get rid of". Petitioner said he "could handle them * * * at a price * * *" (R. 33). Kennedy obtained from the co-defendant McIntosh 22 blank $50 money orders, totaling $1,100 (R. 33–34). Petitioner asked Kennedy to sign the money orders, but Kennedy refused to do so since he knew they had been stolen and told petitioner that they had been stolen (R. 35, 37). Petitioner then signed all the blank money orders and deposited them in the corporate bank account of Lenmark Associates (R. 35, 43, 47, 59). Petitioner told Kennedy to sign any name to a loan record he wanted to keep, and Kennedy signed "John Robinson". Petitioner then gave Kennedy $450. Petitioner also made out a check for $1,050 payable to John Robinson (Gov. Ex. 24), and had Kennedy endorse it in the name of John Robinson (R. 35, 38). According to Kennedy, petitioner kept the check (R. 35).

When an agent for the American Express Company notified petitioner that the money orders had been stolen in blank, petitioner said that he had received them as collateral for a loan made to a man, sent to him by a friend, whom he had not known before. Petitioner reimbursed the company (R. 40–41). When interviewed by an F.B.I. agent, petitioner first said that he had obtained the money from a man named Robinson, but, after consulting with his

partner, a lawyer, petitioner changed his story, saying he had obtained the money orders from Kennedy (R. 44–45).

2. After denial of a defense motion for acquittal, this colloquy occurred (R. 86–87):

> Mr. GORMAN: (defense counsel): * * * Would your Honor order a presentence investigation?
>
> The COURT: Well, I will hear you on a motion for probation, if you care to make one. I will hear you orally. I have heard the defendant's history from him on the stand, and if at this time you care to make a motion for probation, I will certainly hear anything you care to say or to offer in support of it.

Counsel spoke in support of the motion for probation, pointing out the petitioner's prior history as a law-abiding citizen and the fact that he had made restitution (R. 87). Then this discussion occurred (R. 88):

> The COURT: I want to read [the F.B.I. report of the investigation] and you rely on your motion for probation on what you have just said with reference to the record already.
>
> Is there anything else that you want to submit?
>
> Mr. GORMAN: No. I do not believe that there is anything further that I could submit.

At the resumption of the hearing the following afternoon defense counsel again spoke in favor of probation (R. 89–91). In denying the motion, the court observed, "I have carefully considered the motion and have carefully reviewed the evidence which you have submitted in support of your motion, principally the

evidence which was adduced on the trial, and have also read carefully a report of the F.B.I. last evening. * * * I feel, considering all of the factors in this case, this is not a case for probation. * * *" (R. 92).

ARGUMENT

1. Contrary to the petitioner's contention (Pet. 6–7, 20–22), the indictment did state federal offenses under 18 U.S.C. 2314 (*supra*, p. 2) and the evidence showed that such offenses had been committed. The use of the forged Gliekman stamp on the American Express money orders clearly made them forged and falsely made instruments since they were not, as they on their face purported to be, issued by a subagent of the American Express Company under its authority.[1]

Irrespective of the correctness of the "true name" decisions, cited by the petitioner as being in conflict with the decision below, those cases are distinguishable from the case at bar. In *United States* v. *Greathouse*, 170 F. 2d 512 (C.A. 4), *Wright* v. *United States*, 172 F. 2d 310 (C.A. 9), and *Martyn* v. *United States*, 176 F. 2d 609 (C.A. 8), a check was drawn by

[1] The sufficiency of an indictment is not open on collateral attack unless it is so obviously defective that under no reasonable construction can it be said to charge the crime for which sentence is imposed. *Goto* v. *Lane*, 265 U.S. 393; *McGann* v. *United States*, 249 F. 2d 431 (C.A. 4), certiorari denied, 356 U.S. 923; *Banks* v. *United States*, 239 F. 2d 409 (C.A. 7), certiorari denied, 353 U.S. 960. Since the indictment here did charge federal offenses and was not defectively stated, the holding by the court below that it was not subject to collateral attack was correct. The present proceeding is collateral since petitioner did not take a timely appeal.

the maker on an existing bank in which he had no funds. Similarly, in *Marteney* v. *United States,* 216 F. 2d 760 (C.A. 10), the warehouse receipts involved were themselves genuine, but the warehouse did not have grain in storage represented by the receipts. In *United States* v. *Brown,* 246 F. 2d 541 (C.A. 2), genuine drafts executed by the defendant as the true maker were not "falsely made" under the statute, even though he obtained payment on them by other falsely made documents. In all of those cases the instrument involved was exactly what it purported to be and had been executed by the defendant as the true maker; no part of the instrument was forged or spurious. In the instant case, however, even though the petitioner signed the money orders as sender with his true name, they were not what they purported to be. They purported to be money orders sold by Glickman as subagent, but they were not, since Glickman's stamp had been stolen and forged on them.

2. Petitioner contends that in summarizing the indictment (Appendix E, Pet. App. 13a–14a), the court's omission to inform the jury that he was charged with causing the transportation of the money orders knowing that they had been "falsely made, forged and counterfeited," constituted reversible error (Pet. 23–24). The full charge is not included in the record. Not only is this issue precluded by the failure of petitioner's counsel to make an objection before the jury retired to consider its verdict, as required under Rule 30, F.R. Crim. P. (Pet. App. 12a), but it is not a basis for attack under 28 U.S.C.

2255 or a motion to correct sentence. See *Sunal* v. *Large*, 332 U.S. 174. Indeed, the point was not raised even in the motions to vacate sentence (R. 102–110) or in the briefs in the court of appeals.

3. There is no merit to the petitioner's contention (Pet. 24–25) that the court erred in imposing sentence without requiring a presentence investigation under Rule 32(c)(1), F.R. Crim. P. (*supra*, p. 2). Under the language of Rule 32(c)(1), a presentence report is not mandatory; its use is within the discretion of the trial judge. *E.g.*, *United States* v. *Visconti*, 261 F. 2d 215, 217 (C.A. 2), certiorari denied, 359 U.S. 954; *United States* v. *Schwenke*, 221 F. 2d 356, 358 (C.A. 2); *United States* v. *Williams*, 254 F. 2d 253, 254 (C.A. 3); *United States* v. *Karavias*, 170 F. 2d 968, 971–972 (C.A. 7); *Tarkington* v. *United States*, 194 F. 2d 63, 68 (C.A. 4).

This is not a situation similar to that involved in *United States* v. *Wiley*, 267 F. 2d 453 (C.A. 7), upon which petitioner relies, where the sentencing court erroneously refused to consider a motion for probation of an accused who stood trial instead of pleading guilty. Here the court entertained the oral motion for probation and gave the petitioner and his counsel every opportunity to make whatever statements they thought advisable prior to sentencing (R. 86–93). He specifically asked the petitioner if he wished to speak and petitioner did so (R. 93). In his later motion to correct sentence, petitioner urged that the failure to have the regular presentence investigation resulted in the non-disclosure of his poor physical condition and that of his wife and child (R.

108–110). Petitioner and his counsel could have divulged this information at the hearing on the motion for probation, but did not do so. Neither did they make any objection at that time to the court's consideration of the F.B.I. report nor request inspection of it. It seems evident that the judge wished to predicate his sentence on the facts relating to petitioner's participation in the crime charged and for that reason wished to consider, in addition to the evidence at the trial, all the circumstances surrounding the crime including facts relating to the participation by persons not on trial which would not be developed at the trial. Petitioner, who did not object at the time of sentencing, thus would have had no basis to complain of the procedure followed on direct review. He clearly cannot show that sentence was illegally imposed.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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